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Department of Labor Issues Guidance for New Statutory Exemption Applicable to Investment Advice Given by Fiduciary Advisers

The Investment Advice Exemption under the Pension Protection Act

The Pension Protection Act of 2006 (PPA) amended ERISA by adding a statutory exemption (effective beginning in 2007) relating to investment advice provided by a “fiduciary adviser” to participants of defined contribution plans (401k’s) under an “eligible investment advice arrangement.” This exemption is available only for ERISA-covered plans that permit participants and beneficiaries to direct investments in their plan accounts. A “fiduciary adviser” must be a fiduciary of the plan by reason of providing investment advice and must be one of the following entities or individuals: a registered investment adviser, a bank or similar financial institution, an insurance company, a registered broker dealer, an affiliate of one of the above or an employee, agent or registered representative of any of these entities. Under the PPA, an “eligible investment advice arrangement” is an arrangement that either (1) provides that any fees received by the fiduciary adviser will not vary based on the investment options selected (e.g., “fee leveling” approach), or (2) uses a computer model under an investment advice program that meets the requirements set forth under the statutory exemption (e.g., the “computer model” approach). For the exemption to apply, a plan sponsor or other plan fiduciary must make a prudent selection of the fiduciary adviser and **should perform a periodic review of the selected adviser**. If the requirements of the statutory exemption are met, the prohibited transaction rules will not apply to the fiduciary adviser’s investment advice to participants, any investment transactions based on the advice, or the direct or indirect receipt of fees charged for the investment advice

Clarification of the Exemption by the Department of Labor

In response to this new statutory exemption, the Department of Labor (“DOL”) has issued Field Assistance Bulletin 2007-01 (FAB), which provides clarification on the responsibility and liability of plan sponsors and other fiduciaries in the context of an eligible investment advice arrangement, the fee-leveling approach and the impact of the exemption on prior investment advice guidance issued by the DOL.

With respect to the responsibility and liability of plan sponsors and other fiduciaries, the DOL states in the FAB that a plan fiduciary **should engage in an objective process that is designed to obtain the information necessary to determine the fiduciary adviser’s qualifications, quality of services offered and reasonableness of the fees charged for the service. Future monitoring of the selected adviser should be performed periodically by the plan sponsor to determine if any changes have occurred which may influence the original selection. If the foregoing requirements are met, the plan sponsor or other plan fiduciary will not be liable for the advice provided by a fiduciary adviser and will not be responsible for monitoring the specific investment advice provided to participants.**

Regarding the fee-leveling approach, the FAB clarifies the requirement that any fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets do not vary depending on the basis of any investment options selected. According to the DOL, only the fees or other compensation of the fiduciary adviser may not vary. An affiliate of the fiduciary adviser will be subject to the varying fee limitation only if that affiliate is providing investment advice to plan participants and beneficiaries. Thus, the fee-leveling requirement does not extend to affiliates of the fiduciary adviser unless the affiliate is also a provider of investment advice to a plan. (Regarding the computer model approach, the DOL has issued last December a Request for Information, which solicits information from the public relating to the requirements in the new statutory exemption that a computer model which serves as the basis for an eligible investment advice arrangement be certified by an independent investment expert as meeting specific criteria, and that information regarding certain fees and compensation be disclosed to participants and beneficiaries.

With respect to the impact of the new statutory exemption on prior DOL guidance concerning investment advice to participants, the DOL confirmed that such guidance is still valid and may be continued to be relied upon by plan sponsors and service providers which provides a safe harbor for the provision of investment education and asset allocation models to plan participants.

If we can help you answer questions relating to this exemption, please contact our office,

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